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Supreme Court, U.S.
FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1125

In The

Supreme Court of the United States

October Term, 1989

THORN APPLE VALLEY, INC.,

Petitioner,

v.

AUTO CLUB INSURANCE ASSOCIATION,
SUBROGEE OF:
ALI CHEHAB, FAYSAL MASLOUM, HOUHAD JAMIL BASSI,
HUSSEIN E. HABAIB, NASRI JOMAA, ALI K. HASHEM,
AND SAMI M. ALAOUIE,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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31 pp

QUESTIONS PRESENTED

I.

IS THE QUESTION WHETHER THE PREEMPTION PROVISION OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, 29 U.S.C. § 1144, BARS AN INSURER FROM ASSERTING AS SUBROGEE THE RIGHTS OF EMPLOYEE WELFARE BENEFIT PLAN PARTICIPANTS AND BENEFICIARIES IN AN ACTION BROUGHT IN STATE COURT PURSUANT TO SECTION 502 OF ERISA, 29 U.S.C. § 1132(a)(1)(B), SUBJECT TO REVIEW BY THIS COURT, WHERE THE QUESTION WAS NEITHER PRESENTED TO NOR DECIDED BY THE COURT BELOW?

II.

MAY THE RULE OF MICH. COMP. LAWS ANN. § 500.3109a, AS CONSTRUED BY THE MICHIGAN SUPREME COURT IN *FEDERAL KEMPER INS. CO.* v. *HEALTH INSURANCE ADMINISTRATION*, 424 MICH. 537; 383 N.W.2d 590 (1986), BE APPLIED TO A SELF-FUNDED ERISA EMPLOYEE WELFARE BENEFIT PLAN UNDER SECTION 514 OF ERISA, 29 U.S.C. § 1144, AS INTERPRETED BY THIS COURT?

PARTIES TO THE PROCEEDINGS

All parties to the proceeding in the court below appear in the caption. Auto Club Insurance Association is a Michigan reciprocal insurance exchange affiliated with the Automobile Club of Michigan and having no parent company and no subsidiaries except wholly owned subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD BE DENIED:

I. THE FIRST QUESTION PRESENTED BY THE PETITION WAS NEITHER PRESENTED TO NOR DECIDED BY THE COURT BELOW. 4

II. THE DECISION OF THE STATE COURT DOES NOT CONFLICT WITH, BUT RATHER APPLIES THE REASONING OF, THIS COURT'S DECISIONS IN THE AREA OF ERISA PREEMPTION. 8

III. PETITIONER'S CLAIM THAT THIS CASE INFRINGES ON CONGRESS' INTENDED PREEMPTION OF THE FIELD OF ERISA DISPUTE RESOLUTION FINDS NO SUPPORT IN THE RECORD. 14

IV. *CERTIORARI* SHOULD NOT BE GRANTED TO RESOLVE NON-EXISTENT CONFLICTS, OR TO RESOLVE ALLEGED CONFLICTS BETWEEN CIRCUITS ON QUESTIONS NOT PRESENTED BY THIS CASE. 16

V. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR CONSIDERATION OF THE QUESTIONS PRESENTED. 23

CONCLUSION 24

TABLE OF AUTHORITIES

PAGE

CASES:

Allstate Ins. Co. v. *The 65 Security Plan*, 879 F.2d 90 (3d Cir. 1989) 17

American Surety Co. of New York v. *Bethlehem National Bank of Bethlehem, Pa.*, 314 U.S. 314 (1941) 9

Auto Club Insurance Association v. *Frederick & Herrud*, 145 Mich. App. 722; 377 N.W.2d 902 (1985) 3

Auto Club Insurance Association v. *Frederick & Herrud*, 175 Mich. App. 412; 438 N.W.2d 320 (1989) 1, 6

Dowood Co. v. *Michigan Tool Co.*, 14 Mich. App. 158; 165 N.W.2d 450 (1968) 6

Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1983) 7

Federal Kemper Ins. Co. v. *Health Insurance Administration*, 424 Mich. 537; 383 N.W.2d 590 (1986) 9, 18, 21, 23

Fuller v. *Oregon*, 417 U.S. 40; 94 S.Ct. 2116; 40 L.Ed.2d 642 (1974) 7

Hermann Hospital v. *MEBA Medical & Benefits Plan*, 845 F.2d 1286 (5th Cir. 1988) 10, 16

Illinois v. *Gates*, 462 U.S. 213 (1983) 4

Kanne v. *Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied* 109 S.Ct. 3216 (1989) 18, 19

Kukowski v. *Piskin*, 415 Mich. 31; 327 N.W.2d 832 (1982) 6

PAGE

Liberty Mutual Insurance Group v. *Iron Workers Health Fund of Eastern Michigan*, 879 F.2d 1384 (6th Cir. 1989) 21, 22, 23

Mackey v. *Lanier Collections Agency*, 486 U.S. —; 108 S.Ct. 2182 (1988) 10, 15, 18

Metropolitan Life Ins. Co. v. *Massachusetts*, 471 U.S. 724 (1985) ..... *passim*

Metropolitan Life Ins. Co. v. *Taylor*, 481 U.S. 58 (1987) 8, 10

Midwest Bridge Co. v. *Highway Dept.*, 24 Mich. App. 151; 180 N.W.2d 117 (1970) 6

Misic v. *Building Service Employees Health & Welfare Trust*, 789 F.2d 1374 (9th Cir. 1986) 10, 16

Northeast Department ILGWU Health & Welfare Fund v. *Teamsters Local Union Number 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985) .. 16, 17

Northern Group Services v. *Auto-Owners Ins. Co.*, 833 F.2d 85 (6th Cir. 1987), *cert. denied* 108 S.Ct. 1754 (1988) ..... *passim*

Pearlman v. *Reliance Ins. Co.*, 371 U.S. 132 (1962) 9

People v. *Hamacher*, 432 Mich. 157; — N.W.2d — (1989) 6

Perry v. *Thomas*, 482 U.S. —; 107 S.Ct. 2520 (1987) 4

Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) ..... *passim*

Street v. *New York*, 394 U.S. 576; 89 S.Ct. 1354; 22 L.Ed.2d 572 (1969) 7

PAGE

Tebo v. *Havlik*, 418 Mich. 350; 343 N.W.2d 181 (1984) 7

Winstead v. *Indiana Ins. Co.*, 855 F.2d 403 (7th Cir. 1988), *cert. denied* — U.S. —; 109 S.Ct. 839 (1989) 20, 21

STATUTES:

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751, *et seq.* 7

McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.* 12

National Gas Policy Act of 1978, 15 U.S.C. § 3301, *et seq.* 7

28 U.S.C. § 1257(a) 1

29 U.S.C. § 1132(a)(1)(B) 5, 9, 10, 16

29 U.S.C. § 1132(e) 5, 15

29 U.S.C. § 1144 4

Mich. Court R. 7.212(F) 5

Mich. Comp. Laws Ann. § 500.3109a 2, 3, 9, 12, 18, 21

California Insurance Code § 790.03(h) 19

MISCELLANEOUS:

ERISA Section 502 15

ERISA Section 514 5

No. 89-1125

In The

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October Term, 1989

THORN APPLE VALLEY, INC.,

Petitioner,

v.

AUTO CLUB INSURANCE ASSOCIATION, SUBROGEE OF: ALI CHEHAB, FAYSAL MASLOUM, HOUHAD JAMIL BASSI, HUSSEIN E. HABAB, NASRI JOMAA, ALI K. HASHEM, AND SAMI M. ALAOUIE,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Auto Club Insurance Association respectfully asks that this Court deny the Petition for Writ of *Certiorari* seeking review of the Michigan Court of Appeals' opinion in this case, which is reported as *Auto Club Insurance Association* v. *Frederick & Herrud*, 175 Mich. App. 412; 438 N.W.2d 320 (1989).

JURISDICTION

Petitioner asserts that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). Respondent submits that this Court is without jurisdiction to decide the first Question Presented in the Petition, because it was neither presented to nor decided by the court below.

STATEMENT OF THE CASE

Respondent Auto Club Insurance Association insured Respondent's subrogors under several policies of no-fault insurance. Respondent's subrogors were also participants in or beneficiaries of an employee welfare benefit plan for employees of Petitioner Thorn Apple Valley, Inc. (then known as Frederick & Herrud). The policies issued by Respondent provided, as authorized by Mich. Comp. Laws Ann. § 500.3109a, that medical expense coverage was to be coordinated with coverage provided by Petitioner's plan.

When Respondent's subrogors were injured in motor vehicle accidents, Respondent paid their medical costs and sought reimbursement from Petitioner, as administrator of its employee welfare benefit plan. When Petitioner refused, on the ground that its plan provided only excess coverage for medical expense occasioned by an automobile accident, where the employee was also covered by a no-fault insurance policy, Respondent brought this action.[1]

In their pleadings, the parties relied upon the provisions of their contracts and Michigan law. Both parties brought motions for summary disposition, each alleging that the other was entirely responsible for payment of the medical expense incurred by the employee-insureds as a result of motor vehicle accidents. The circuit judge, applying contract law, ruled that each party was responsible for payment of one-half the medical expenses and judgment was entered accordingly.

On appeal, the Michigan Court of Appeals ruled that the public policy underlying the Michigan no-fault

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[1] A number of actions originally filed by Respondent in Michigan district courts were consolidated and removed to the Oakland County Circuit Court.

insurance statute required that the coordination of benefits provision in Respondent's contract be given overriding effect, and Petitioner was therefore primarily liable for payment of medical expenses incurred by the employee-insureds. See *Auto Club Insurance Association* v. *Frederick & Herrud, Inc.*, 145 Mich. App. 722; 377 N.W.2d 902 (1985). Petitioner did not seek leave to appeal this decision to the Michigan Supreme Court.

Upon remand to the circuit court, Petitioner sought leave to amend its answer to allege for the first time a defense of federal preemption of Michigan law by the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* Defendant also moved for summary disposition on the ground that ERISA not only preempted Michigan law, but also deprived Michigan courts of jurisdiction over the subject matter of this action. The circuit court denied both of Petitioner's motions.

Petitioner appealed again to the Michigan Court of Appeals, arguing that Mich. Comp. Laws Ann. § 500.3109a was preempted by ERISA as applied to Petitioner, that the circuit court abused its discretion in refusing to allow Petitioner to amend its answer to assert the preemption defense, and that ERISA deprived Michigan courts of jurisdiction over actions such as that brought by Respondent.

The Michigan Court of Appeals recognized that the merits of Petitioner's claim of federal preemption were not addressed by the circuit court, but chose to address the merits of that defense anyway. Relying on *Northern Group Services, Inc.* v. *Auto-Owners Ins. Co.*, 833 F.2d 85 (6th Cir. 1987), *cert. denied* ___ U.S. ___; 108 S.Ct. 1754 (1988), the Michigan Court of Appeals ruled that Mich. Comp. Laws Ann. § 500.3109a is not preempted by ERISA. Petitioner's timely application for leave to appeal the Court of Appeals' decision to the Michigan Supreme Court was denied on November 1, 1989.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE FIRST QUESTION PRESENTED BY THE PETITION WAS NEITHER PRESENTED TO NOR DECIDED BY THE COURT BELOW.

As the first Question Presented in the Petition, Petitioner asks this Court to determine whether "Section 514 of ERISA, 29 U.S.C. § 1144, preempts a state common law subrogation claim . . ." That question, however, was never properly presented to nor decided by the Michigan courts.

This Court has long adhered to the rule that it will not review on a petition for writ of *certiorari* a question not presented to or decided by the state court, either because the Court lacks jurisdiction to do so or because prudential considerations counsel against such review. See *Illinois* v. *Gates*, 462 U.S. 213, 217-224 (1983). See also *Perry* v. *Thomas*, 482 U.S. __; 107 S.Ct. 2520, 2526-2527 (1987).

In the present case, Petitioner failed to raise any federal question whatsoever until after the case was disposed of on the merits by the Michigan trial court and appealed to the Michigan Court of Appeals. Upon remand following the decision of the Michigan Court of Appeals, Petitioner sought leave to amend its answer to the complaint to add the affirmative defense of ERISA preemption. Petitioner also moved for summary disposition on the ground that ERISA ousted the state courts of subject matter jurisdiction. Both motions were denied by the circuit court.

On further appeal to the Michigan Court of Appeals, Petitioner in its Brief on Appeal asserted that three questions were involved in the appeal: (1) Whether the

Michigan no-fault insurance act is preempted by Section 514(a) of ERISA; (2) whether ERISA deprived the trial court of subject matter jurisdiction over this case; and (3) whether Petitioner was entitled to assert the defense of federal preemption upon remand after the earlier decision of the Michigan Court of Appeals. In its arguments, Petitioner contended that ERISA preempted the Michigan no-fault automobile insurance act and any public policy considerations underlying that act; that ERISA preemption deprived the state court of subject matter jurisdiction; and that the trial court abused its discretion under Michigan law in refusing to allow Petitioner to amend its answer to assert the defense of federal preemption.

In its Brief on Appeal as appellee in the Michigan Court of Appeals, Respondent, replying to Petitioner's statement that Respondent's action was not authorized by ERISA Section 502, 29 U.S.C. § 1132(a)(1)(B) and (e)(1) because Respondent was not a participant in or beneficiary of an employee welfare benefit plan, maintained that Respondent was entitled to bring an action in state court under the cited provision because it was asserting as subrogee the rights of participants and beneficiaries. Respondent's Brief as appellee was filed in the Michigan Court of Appeals in July of 1987. Petitioner's argument that common-law subrogation is preempted by ERISA was first asserted in Petitioner's Second Supplemental Brief, filed in July of 1988. At no time did Petitioner amend or seek to amend its statement of questions to add the issue of ERISA preemption of subrogation rights in its appeal to the Michigan Court of Appeals. In any event, the Michigan Court Rules provide that a supplemental brief may not raise a new question. Mich. Court R. 7.212(F).

Michigan courts have also long applied the rule that an issue not raised in the trial court and not timely

presented to the appellate court need not be considered. See *People* v. *Hamacher*, 432 Mich. 157, 168, n. 18; — N.W.2d — (1989); *Kukowski* v. *Piskin*, 415 Mich. 31, 41, n. 4; 327 N.W.2d 832 (1982); *Midwest Bridge Co.* v. *Highway Dept.*, 24 Mich. App. 151, 153; 180 N.W.2d 117 (1970). See also *Auto Club Insurance Association* v. *Frederick & Herrud*, 175 Mich. App. 412, 415; 438 N.W.2d 320 (1989).

> "The point is not squarely presented on this appeal and it was not briefed and argued here except in a passing reference in defendant's brief. We leave initial resolution of the question to the learned trial judge."

Dowood Co. v. *Michigan Tool Co.*, 14 Mich. App. 158, 164; 165 N.W.2d 450 (1968). Although the Michigan Court of Appeals elected to address the question of ERISA preemption of the Michigan no-fault insurance statute despite Respondent's failure to raise the question in the trial court, the Court of Appeals did not discuss (or even mention) the issue of preemption of common-law subrogation. The issue was thus never pressed upon nor decided by the Court in the opinion of which Petitioner now seeks review in this Court.

Petitioner did raise the issue of ERISA preemption of the subrogation doctrine in its application for leave to appeal to the Michigan Supreme Court. This belated attempt to bring the issue before the Michigan courts does not serve to preserve the issue for review by this Court. As noted above, Petitioner seeks review in this Court of the decision of the Michigan Court of Appeals, not a decision of the Michigan Supreme Court. The order of the Michigan Supreme Court denying leave to appeal cannot be viewed as a ruling on the merits of Petitioner's claim of preemption of subrogation law, for it is well established in Michigan law that an order of

the Michigan Supreme Court denying leave to appeal does not constitute an expression of opinion on the merits. See *Tebo* v. *Havlik*, 418 Mich. 350, 371, n. 2; 343 N.W.2d 181 (1984) (opinion by RYAN, J.).

In *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983), this Court reviewed a decision of the Alabama Supreme Court holding that an Alabama statute was not preempted by the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301, *et seq.*, but declining to consider the question whether the Alabama law was preempted by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751, *et seq.*:

> "The decision below does not discuss this issue, and when '"the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."' *Fuller* v. *Oregon*, 417 U.S. 40, 50, n. 11, 94 S.Ct. 2116, 2123, n. 11; 40 L.Ed.2d 642 (1974), quoting *Street* v. *New York*, 394 U.S. 576, 582; 89 S.Ct. 1354, 1360; 22 L.Ed.2d 572 (1969)."

Exxon, 462 U.S. at 181, n. 3. The Court concluded that the appellants had failed to make the requisite showing, noting that the trial court opinion made no mention of the EPAA and nothing in the record showed that the issue had even been raised in the trial court. The Court also noted that appellants addressed the issue in their brief before the Alabama Supreme Court, but that court did not pass on the issue. This Court also noted that it is the practice of the Alabama courts not to consider issues raised for the first time on appeal. *Id.*

The issue of ERISA preemption of subrogation doctrine, like the EPAA preemption issue in *Exxon*, has

not been passed upon by the Michigan courts as a result of Petitioner's failure to timely press the issue upon the state courts. Under these circumstances, it is the practice of this Court to decline to review the question.

II.

THE DECISION OF THE STATE COURT DOES NOT CONFLICT WITH, BUT RATHER APPLIES THE REASONING OF, THIS COURT'S DECISIONS IN THE AREA OF ERISA PREEMPTION.

The decision of the state court does not conflict with this Court's decisions in *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987) and *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987). In *Pilot Life*, this Court held that state common-law causes of action for tortious breach of contract, breach of fiduciary duties and fraud in the inducement, seeking extra-contractual and tort damages, were preempted by ERISA, and did not fall within the insurance savings clause because their application was not limited to insurance law. In *Metropolitan Life* v. *Taylor*, the Court held that, in light of the fact that Taylor's common-law contract and tort claims are preempted by Section 514(a) of ERISA and that an action by a beneficiary to recover benefits due from an ERISA plan falls within the express grant of jurisdiction to federal courts under § 502(a)(1)(B), such an action is removable to federal district court. Petitioner argues that the decision of the state court in this case conflicts with *Dedeaux* and *Taylor* because Respondent asserts a claim relying upon common-law subrogation which, being a general common law doctrine, is not saved from preemption by the insurance savings clause. Petitioner misperceives the nature of Respondent's claim.

Petitioner confuses the source of Respondent's cause of action with the source of Respondent's standing to assert that cause of action. The substantive law upon which Respondent's cause of action rests is § 3109a of the Michigan no-fault act, Mich. Comp. Laws Ann. § 500.3109a, as construed by the Michigan Supreme Court in *Federal Kemper Ins. Co.* v. *Health Insurance Administration*, 424 Mich. 537; 383 N.W.2d 590 (1986). Under *Federal Kemper*, beneficiaries of Petitioner's plan who are injured in motor vehicle accidents and have purchased coordinated no-fault coverage are entitled to obtain medical benefits from Petitioner's plan as primary coverage, even though the plan itself attempts to make its coverage for such injuries excess. The rights given Respondent's subrogors by *Federal Kemper* may be asserted under 29 U.S.C. § 1132(a)(1)(B). The doctrine of subrogation merely transfers the rights of Respondent's subrogors to Respondent, thus giving it standing to sue Petitioner.

The doctrine of subrogation is recognized in both state and federal law. In the context of bankruptcy actions, this Court has long recognized the existence of equitable doctrines such as subrogation in federal common-law:

> "Among the oldest of these doctrines is the rule of subrogation whereby 'one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other'."

American Surety Co. of New York v. *Bethelehem National Bank of Bethlehem, Pa.*, 314 U.S. 314, 317 (1941). Accord, *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132, 136-137 (1962). The *American Surety* court also noted that the subrogee succeeds not only to the rights

of the subrogor, but to his means for enforcing those rights. *Id.*

The common-law doctrine of subrogation is like the statutory procedure of garnishment, whose applicability to ERISA plans was recently upheld in *Mackey* v. *Lanier Collections Agency & Services, Inc.*, 486 U.S. __; 108 S.Ct. 2182 (1988). In *Mackey*, this Court struck down a provision of the Georgia garnishment statute exempting ERISA plans from garnishment except in certain limited circumstances, holding that the provision was preempted by ERISA. However, the Court held that the general provisions of the Georgia garnishment statute were not preempted, and garnishment actions brought pursuant to the Georgia statute could be asserted against ERISA plans. See also *Misic* v. *Building Service Employees Health & Welfare Trust*, 789 F.2d 1374, 1378-1379 (9th Cir. 1986), and *Hermann Hospital* v. *MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1289-1290 (5th Cir. 1988), upholding the right of a participant in or a beneficiary of an ERISA plan to assign his rights to benefits under the plan, and the right of the assignee to bring an action under 29 U.S.C. § 1132(a)(1)(B).

Unlike the substantive contract and tort claims that this Court found preempted by ERISA in *Pilot Life* and *Metropolitan Life* v. *Taylor*, the doctrine of subrogation creates no substantive rights. Subrogation, like assignment and garnishment, simply provides the mechanism for transferring already existing rights from one party to another. Such procedural doctrines, whether common-law or statutory, are not preempted by federal law simply because the substantive right asserted by the subrogee is against an employee benefit plan subject to ERISA.

The decision in this case does not conflict with *Pilot Life* and *Metropolitan Life* v. *Taylor*, but rather is validated by this Court's decision in *Mackey*.

2. The state court decision does not conflict with this Court's decision in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724 (1985). In *Metropolitan Life*, this Court held that ERISA did not preempt a state mandated-benefits law which required insurers providing health benefits to include benefits for mental health services. The Court concluded that such provisions of state law fall within the insurance saving provision of ERISA. Both appellants in *Metropolitan Life* were insurance companies. Therefore, this Court had no occasion to pass upon the scope of the deemer clause. However, the Court concluded its discussion of ERISA preemption with these remarks:

> "We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing we merely give life to a distinction created by Congress in the 'deemer clause,' a distinction Congress is aware of and one it has chosen not to alter. We also are aware that appellants' construction of the statute would eliminate some of the disuniformities currently facing national plans that enter into local markets to purchase insurance. Such disuniformities, however, are the inevitable result of the congressional decision to 'save' local insurance regulation. Arguments as to the wisdom of these policy choices must be directed at Congress."

471 U.S. at 747 (footnote omitted). Petitioner construes the quoted passage as holding that self-insured employee welfare benefit plans are "entirely exempt from all state regulation" (Pet. 8). In fact, it appears to be nothing more than a recognition that Congress, in enacting the deemer clause, intended some distinctions

to be made between regulation of insured and uninsured plans. The decision of the state court in this case does no violence to that proposition.

The decision of the Michigan Court of Appeals was based almost entirely upon the decision of the Sixth Circuit in *Northern Group Services* v. *Auto-Owners Ins. Co.*, 833 F.2d 85 (6th Cir. 1987), *cert. denied* 108 S.Ct. 1754 (1988). That decision, in turn, relied upon and sought to apply this Court's rulings in *Metropolitan Life* v. *Massachusetts* and to discern the intent of the Congress in enacting the deemer clause. The Sixth Circuit in *Northern Group Services* recognized the federal principle, embodied in the McCarran-Ferguson Act (15 U.S.C. § 1011, *et seq.*), to allow the states to regulate insurance without interference by the federal government. Quoting *Metropolitan Life*, the Sixth Circuit in *Northern Group Services* said, "In this area of traditional state regulation, 'the presumption is against pre-emption.'" 833 F.2d at 92. The Sixth Circuit then reviewed the legislative history of the ERISA preemption provisions, and concluded:

> "Certain aspects of the legislative history imply that a main concern of Congress in adopting the final broad version of Section 514 that emerged from the conference committee was to avoid intentional — and perhaps pretextual — attempts by states to restrict the discretion of ERISA plans to engage in practices that otherwise would be permitted by federal law."

833 F.2d at 93 (footnote omitted). Noting that neither intention nor pretext was involved in the enactment of Mich. Comp. Laws Ann. § 500.3109a, the Sixth Circuit decided:

> "In the absence of a showing of state purpose specifically to regulate the content of welfare

> benefits provided by ERISA, the effect of the deemer clause should be assessed by a balancing of the interests in federal uniformity against those of state primacy in the regulation of insurance."

833 F.2d at 93. Weighing the interest in federal uniformity in the area of coordination of benefits against the effect on Michigan insurance law, the Sixth Circuit concluded that Michigan insurance law should prevail. The Sixth Circuit then said:

> "Nor is this approach necessarily inconsistent with the dicta in *Metropolitan Life* concerning insured versus self-insuring plans. [citation omitted]. We preserve a distinction between insured and self-insuring plans. Insured plans would be *per se* 'open to indirect regulation.' [citation omitted]. Self-insuring plans would be subject to state regulation only when no independent federal interest in national uniformity exists to inform and guide the creation of federal common law."

833 F.2d at 94-95 (footnote omitted).

Petitioner characterizes this attempt to balance federal versus state interests (which it ascribes to the Michigan court) as "entirely misconceived," and urges that "[t]his straight-forward expression of congressional intent [the deemer clause] should be strictly enforced" and not sacrificed to "parochial and local concerns" (Pet. 8).[2] In fact, a careful reading of the Sixth Circuit's decision in *Northern Group Services*, upon which the

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[2] Petitioner appears to be alone in its perception that Section 514, particularly the deemer clause, constitutes a straight-forward expression of congressional intent. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739-740.

state court decision is based, reveals that court's analysis to be well-grounded in law and policy. Far from conflicting with this Court's decision in *Metropolitan Life* v. *Massachusetts, Northern Group Services* and the opinion of the state court at issue here assiduously apply the principles enunciated and applied in *Metropolitan Life*.

III.

PETITIONER'S CLAIM THAT THIS CASE INFRINGES ON CONGRESS' INTENDED PREEMPTION OF THE FIELD OF ERISA DISPUTE RESOLUTION FINDS NO SUPPORT IN THE RECORD.

Petitioner claims that the decision of the state court improperly interferes with the congressional intent to make ERISA's civil enforcement provision the exclusive remedy for claims relating to ERISA-regulated employee welfare benefit plans. In this argument, as in others, Petitioner fails to distinguish between the law that confers the substantive right to claim benefits on Respondent's subrogors (Michigan insurance law) and the doctrine that gives Respondent the right to assert its subrogors' rights (subrogation, recognized in both state and federal law).

1. Contrary to Petitioner's assertion, the decision of the state court does not confer on Respondent rights greater than those possessed by its subrogors. Under the decision of the state court in the case at bar, and under *Northern Group Services*, a plan beneficiary who has purchased no-fault insurance providing for coordination of medical benefits may compel the employee welfare benefit plan of which he is a beneficiary to provide primary coverage for medical expense occasioned by an auto accident, even if the plan purports to provide only

excess coverage. As subrogee, Respondent is seeking to assert only those rights in this action.

2. In ERISA Section 502(a)(1)(B), Congress provided a right of action for plan participants or beneficiaries to recover benefits due them or to enforce their rights or to clarify their rights under the plan. 29 U.S.C. § 1132(a)(1)(B). In the same section, Congress specifically provided that state courts and federal district courts should have concurrent jurisdiction of actions arising under Section 502(a)(1)(B). 29 U.S.C. § 1132(e). Under decisions of this Court and of the circuit courts, state laws that allow for the transfer of rights of participants or beneficiaries to third parties, and allow those third parties to assert the rights of the participants or beneficiaries against the plan, are not preempted by ERISA. See *Mackey* v. *Lanier Collections Agency & Service, Inc.*, 486 U.S. __; 108 S.Ct. 2182 (1988). Subrogation is one of those laws.

Moreover, subrogation is a well-established tenet of federal law, long recognized by this Court. See discussion in **II**, *supra*.

Subrogation creates no new right of action nor any substantive remedy, but simply allows the transfer of already-existing rights and remedies to a third party, who can then assert those rights in either state or federal court. Allowing subrogees of plan participants or beneficiaries to assert their rights against employee welfare benefit plans neither interferes with nor adds to the scheme of enforcement and dispute resolution established by Congress.

IV.

CERTIORARI SHOULD NOT BE GRANTED TO RESOLVE NON-EXISTENT CONFLICTS, OR TO RESOLVE ALLEGED CONFLICTS BETWEEN CIRCUITS ON QUESTIONS NOT PRESENTED BY THIS CASE.

Petitioner asks this Court to grant a writ of *certiorari* to review and resolve certain alleged conflicts among the circuits and state courts. None of the alleged conflicts provides any ground for granting *certiorari* in this case.

1. There is no clear conflict among the circuits on the question whether ERISA preempts application of a state statute or common-law doctrine recognizing the right of subrogation. Respondent contends that a conflict exists among the circuits on the question whether employee welfare benefit plan rights may be assigned and whether an assignee or subrogee may bring an action against a plan under Section 502 of ERISA. Petitioner correctly points out that the Fifth Circuit and the Ninth Circuit have held that the right to benefits under an ERISA-regulated plan may be assigned, and the assignee has standing to sue under Section 502. See *Hermann Hospital* v. *MEBA Medical & Benefits Plan*, 845 F.2d 1286 (5th Cir. 1988); *Misic* v. *Building Service Employees Health & Welfare Trust*, 789 F.2d 1374 (9th Cir. 1986). It is, however, less clear that the Third Circuit has squarely held that participant or beneficiary rights under ERISA are not subject to assignment or subrogation. In *Northeast Department ILGWU Health & Welfare Fund* v. *Teamsters Local Union Number 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985), the Third Circuit, en route to finding no federal court jurisdiction under 29 U.S.C. § 1132(a)(1)(B), declined to hold that the ILGWU fund was the assignee or subrogee of the beneficiary. The Third Circuit noted that "Congress simply

made no provision in § 1132(a)(1)(B) for persons other than participants and beneficiaries to sue, including persons purporting to sue on their behalf." 764 F.2d at 154, n. 6. The Third Circuit also noted, however, that no assignment was in fact made in that case, and expressed its doubts that the fund had pursued only the beneficiary's rights in the action and its doubts about whether the right to sue in federal court could be assigned along with substantive rights against an ERISA fund. 764 F.2d at 154, n. 6.

Subsequently, in *Allstate Ins. Co.* v. *The 65 Security Plan*, 879 F.2d 90 (3d Cir. 1989), the Third Circuit found that the federal district court had no removal jurisdiction over an action brought in state court by a no-fault insurer against an employee benefit plan, finding that the complaint stated only state law causes of action. Citing *Northeast Department ILGWU* v. *Teamsters*, the Third Circuit in *Allstate* rejected an argument that an action under ERISA was stated because the no-fault insurer was subrogated to the beneficiary's claim against the employee welfare benefit plan. Even taken together, the two Third Circuit cases present something less than a clear holding that the right to benefits under an employee welfare benefit plan is not subject to assignment or subrogation. It is thus far from clear that a conflict on this question exists.

In any event, the question whether the right to benefits may be assigned or transferred by subrogation is not subject to review by this Court, Petitioner having failed to press the issue in the state courts, with the result that the state court did not pass upon the question.

2. This case does not involve the question whether state statutory or common-law anti-subrogation provisions may be applied to employee welfare benefit plans, or are preempted by ERISA. Petitioner asks this Court

to grant *certiorari* to resolve the conflict among the circuits on the question whether state anti-subrogation rules, either common-law or statutory, may be applied to prevent employee welfare benefit plans from being subrogated to the rights of plan participants or beneficiaries. The question whether a state law barring subrogation may be applied to prevent an ERISA-regulated plan from asserting subrogation rights that it would otherwise have under federal common law presents an entirely different issue than the question whether ERISA preemption prevents a no-fault insurer from asserting as subrogee the rights of its insureds against an ERISA-regulated plan. The latter question might conceivably have arisen in the context of this case, had Petitioner timely and properly asserted it before the state courts. The former question can by no stretch of the imagination be considered to arise out of the facts of this case. This case simply does not involve a state anti-subrogation law. *Cf. Mackey* v. *Lanier Collections Agency*, 486 U.S. __; 108 S.Ct. 2182 (1988), striking down a provision of a state statute expressly exempting ERISA-regulated employee welfare benefit plans from garnishment, but upholding against a preemption claim the application of general provisions of garnishment statute to ERISA plans.

3. The Sixth Circuit's decision in *Northern Group Services* v. *Auto-Owners Ins. Co.*, 833 F.2d 85 (6th Cir. 1987), *cert. denied* 108 S.Ct. 1754 (1988), is not in conflict with *Kanne* v. *Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied* 109 S.Ct. 3216 (1989). In *Northern Group Services*, the United States Court of Appeals for the Sixth Circuit held that application of Mich. Comp. Laws Ann. § 500.3109a, as construed by the Michigan Supreme Court in *Federal Kemper Ins. Co.* v. *Health Insurance Administration*, 424 Mich. 537; 383 N.W.2d 590 (1986), was not pre-

empted by ERISA, even as applied to self-insured employee welfare benefit plans, because the statute fell within the insurance savings clause and did not fall afoul of the deemer clause. In *Kanne*, the Ninth Circuit held, *inter alia*, that ERISA preempted a claim by plan participants and beneficiaries for compensatory and punitive damages arising from delay in payment, a private right of action recognized by California courts and grounded upon California Insurance Code § 790.03(h), which prohibited certain unfair trade practices, including failure to act reasonably promptly with respect to claims.

According to Petitioner, the Sixth Circuit's ruling in *Northern Group Services* cannot be reconciled with the Ninth Circuit's ruling in *Kanne*. The two cases, however, are easily distinguishable. *Northern Group Services* simply decided that a statute regulating insurance, as construed by Michigan courts, could be applied to both insured and uninsured employee welfare benefit plans because it came within the insurance savings clause and its application to uninsured plans was not barred by the deemer clause. In *Kanne*, by contrast, the Ninth Circuit held that a judge-created cause of action based on duties imposed upon insurers by the statute was preempted, just as common-law causes of action for bad faith were held preempted by this Court in *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987):

> "The Kannes and the amici point out that the preempted common-law causes of action for bad faith in *Pilot Life* were held not to be laws regulating insurance within the savings clause. They argue that because § 790.03(h) regulates insurance, the savings clause saves that provision from preemption. We can assume, without deciding, that § 790.03(h) is a law regulating insur-

> ance under the savings clause. Nevertheless, under *Pilot Life* we find the conclusion inescapable that the private right of action for violation of § 790.03(h) is preempted by ERISA."

867 F.2d at 493 (footnote omitted). In the omitted footnote, the Ninth Circuit declined to express an opinion as to whether administrative enforcement of the unfair insurance practices provision of the statute were preempted "so as to bar administrative enforcement by California's Insurance Commissioner." 867 F.2d at 493, n. 6.

Thus, the Ninth Circuit in *Kanne* simply held that *Pilot Life* preempted a new, judge-made cause of action for extra-contractual damages, even though that cause of action allegedly arose out of duties imposed on the insurer by statute. The Ninth Circuit ruled that the new cause of action for extra-contractual damages in *Kanne* was not a law which regulated insurance, and did not reach the deemer clause. See 867 F.2d at 494, n. 7. By contrast, *Northern Group Services* simply approved application of a statute regulating insurance to an uninsured employee welfare benefits plan, based upon its interpretation of the deemer clause. The statute construed in *Northern Group Services* did not create a new cause of action for damages, but simply imposed a mandatory construction on certain insurance policy terms. Because the statute in question applied only to insurance, the rule of contract construction at issue in *Northern Group Services*, unlike the general law of contract interpretation struck down in *Kanne*, was not preempted by ERISA. For all these reasons, *Northern Group Services* and *Kanne* are not in conflict.

4. The decision of the Seventh Circuit in *Winstead* v. *Indiana Ins. Co.*, 855 F.2d 403 (7th Cir. 1988), *cert. denied* 109 S.Ct. 839 (1989), does not conflict with the

decision of the Sixth Circuit in *Northern Group Services*. In *Winstead*, the trustees of an ERISA-governed employee welfare benefit fund brought an action (apparently as subrogees) against a Michigan no-fault automobile insurance carrier to recover amounts paid the insured for medical care necessitated by a motor vehicle accident. Both the plan and the no-fault policy contained coordination of benefits clauses. The district court ruled that the plan and the no-fault insurer were liable for pro-rata shares of the medical expense. On appeal, the Seventh Circuit affirmed. The no-fault carrier asked the Seventh Circuit to apply the Sixth Circuit's decision in *Northern Group Services* and hold the plan liable for all the insured's medical benefits. The Seventh Circuit did not reach the issue, however, because the no-fault insurer had failed to file a cross-appeal. Thus no conflict with *Northern Group Services* was created by the *Winstead* decision.

5. The decision of the Sixth Circuit in *Liberty Mutual Insurance Group* v. *Iron Workers Health Fund of Eastern Michigan*, 879 F.2d 1384 (6th Cir. 1989), does not conflict with its decision in *Northern Group Services*. In *Liberty Mutual* v. *Iron Workers*, a beneficiary of the Iron Workers fund, who was insured for no-fault automobile insurance coverage by Liberty Mutual, was injured in a motor vehicle accident. Liberty Mutual paid his medical expenses, and brought an action against the Iron Workers fund to recover sums paid the insured, relying on Mich. Comp. Laws Ann. § 500.3109a, as interpreted by the Michigan Supreme Court in *Federal Kemper* v. *Health Insurance Administration*. The fund, which was self-insured, expressly excluded coverage for loss resulting from an automobile accident. The district court ruled that § 3109a applied only to health insurance policies in which there was a coordination of benefits provision, and had no applica-

tion where coverage for motor vehicle accident injuries was entirely excluded.

On appeal, the Sixth Circuit affirmed, but on a different ground. The Sixth Circuit declined to construe Michigan law. Instead, that court assumed that Michigan courts would hold that *Federal Kemper* applied to exclusions as well as coordination of benefits clauses, and would require the fund to pay medical expense for automobile accident injuries. If Michigan courts would so hold, the Sixth Circuit said, § 3109a, so construed, would constitute a mandated benefits law, and would be preempted (as it applied to self-insured plans) by ERISA, as interpreted by this Court in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724 (1985). The Sixth Circuit in *Liberty Mutual* v. *Iron Workers* distinguished *Northern Group Services*, noting that the effect of the rule as applied in *Northern Group Services* was very different from the effect of the rule contended for by the no-fault insurer in *Liberty Mutual*.

> "The *Northern Group Services* court was not interpreting a statute which requires ERISA plans to provide coverage for automobile accidents even where the plan's unambiguous language excludes such coverage. Section 3109a, as it had then been interpreted by *Federal Kemper* did not regulate the content of welfare benefits provided by ERISA plans, but merely required plans which provide automobile accident coverage to assume primary liability when such coverage is also provided by a no-fault carrier."

879 F.2d at 1387-1388. The rule contended for by Liberty Mutual, the Court said, would "fall within the narrow reading given the 'deemer' clause by the court in *Northern Group Services*." 879 F.2d at 1388. Based on its assumption regarding the Michigan courts' likely

interpretation of *Federal Kemper*, the Sixth Circuit concluded that the state law could not be applied to the Iron Workers Fund because it would be preempted by ERISA.

The distinction cited by the Sixth Circuit in *Liberty Mutual* v. *Iron Workers* is a valid one, and prevents a conflict with *Northern Group Services*.

V.

THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR CONSIDERATION OF THE QUESTIONS PRESENTED.

In its Petition, Petitioner repeatedly refers to the "parochial" view taken by the state court in this case and its disregard of federal law in general and the decisions of this Court in particular. In fact, the state court in this case followed federal law, as enunciated in a decision of the United States Court of Appeals for the circuit in which the state is located. See *Northern Group Services* v. *Auto-Owners Ins. Co.*, 833 F.2d 85 (6th Cir. 1987). This Court has already denied *certiorari* in *Northern Group Services*. This case presents no more compelling reasons for granting *certiorari* than did *Northern Group Services*. The factual record in this case is certainly no more extensive than that in *Northern Group Services*, for this case, like *Northern Group Services*, was decided entirely on motions for summary disposition.

The issue in the case at bar is not more clearly presented than it was in *Northern Group Services*. Indeed, as the Petition shows, Petitioner confuses the separate issues allegedly presented in this case.

Respondent respectfully submits that the resources of this Court would be better expended elsewhere.

CONCLUSION

For all of these reasons, Respondent respectfully asks that the Petition for a Writ of *Certiorari* be denied.

Respectfully submitted,

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Dated: February 5, 1990